by a mere rule of construction. A recent case, *Standard Combed Thread Co.* v. *Pennsylvania Ry. Co.* (N. J. L.), 95 Atl. 1002, clearly demonstrates that when the antecedent of the general term is exhaustive in scope, then the court cannot allow the maxim *ejusdem generis* to make the general term meaningless. In this case, the question arose as to the meaning of the clause in the uniform bill of lading declaring that, at points where the carrier has no agent, goods in cars on private or other sidings shall be at the owner's risk until attached to trains. With full regard to the familiar rule that bills of lading are construed strictly against the carrier,[6] the court held this phrase to include public sidings.

ADMISSIBILITY OF BOOKS AND PAPERS ILLEGALLY SEIZED AS EVIDENCE IN A CRIMINAL PROSECUTION.—The question whether a party can be convicted of a crime upon proof procured from books and papers which have been taken from him without legal authority necessitates a consideration of those constitutional guarantees, appearing in the Federal Constitution and in the fundamental law of every state of this Union, which secure to the individual immunity from unreasonable searches and seizures and from being a witness against himself in a criminal case, and also of that rule of evidence which prohibits a criminal court from permitting a collateral issue to be raised with respect to the source of relevant and material evidence.

The Fourth Amendment to the Federal Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

This provision of the Constitution was intended to safeguard the rights of the people against the encroachments of unlawful and arbitrary power. Its incorporation into the Constitution seems to have followed as a natural consequence the struggle in the Colonies, and later in England, between the liberty of the individual and the exercise by petty officers of an arbitrary power granted by the Colonial "Writ of Assistance," [1] and the English "General Warrant;" [2]

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[6] Baltimore & O. Ry. Co. *v.* Doyle, 74 C. C. A. 245, 142 Fed. 669.

[1] A writ empowering revenue officers, in their discretion, to search suspected places for smuggled goods. The writ was declared by James Otis to be, "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an Engish law book." See 2 WORKS OF JOHN ADAMS 523, 524.

[2] A search warrant issued for the purpose of searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel. The law authorizing such warrants was declared invalid by Lord Camden in Entick *v.* Carrington, 19 How. St. Tr. 1029.

so that the belief seems justified that the rights contended for in opposing those obnoxious and arbitrary writs should properly form a basis of interpretation of this amendment, and indicate the nature of the proceedings condemned by the term "unreasonable searches and seizures." Any invasion, therefore, of the indefeasible right of personal security, personal liberty and personal property would seem to fall within the condemnation of this amendment. These principles were asserted in the early case of *Boyd* v. *United States,*[3] in which case a statute providing for the compulsory production of private books and papers in a prosecution for violation of the revenue laws, and directing that if such books and papers be not produced the prosecutor's version of their contents should be taken as true, was held to be a violation of the privilege against "unreasonable searches and seizures," as well as that against compelling a person in a criminal prosecution "to be a witness against himself." The logic of the court in reaching this decision seems almost irresistible. There is no substantial difference between compelling a man to produce his private documents in court to be used in evidence against him, and in making an actual search for and seizure of such papers for the same purpose. And where the object of any search or seizure is to obtain private documents to be used in evidence against the accused, it is unreasonable within the meaning of the privilege. The opinion in this case maintains the principle that any constitutional provision which relates to the personal security and liberty of the individual should be given a liberal interpretation, and this seems to be the only true rule; else such a provision would be robbed of half its efficacy.

The broad interpretation accorded this amendment in the opinion of the Boyd Case, maintaining the constitutional rights of the individual in every particular, was, in effect, denied in the later case of Adams *v.* New York,[4] which held, though not without some un-

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[3] 116 U. S. 616. In this connection, the distinction between reasonable and unreasonable searches must be noticed. As was pointed out by the learned justice, who delivered the opinion of the court in this case, a very important distinction exists between the search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, and the search for and the seizure of a man's private papers and books for the purpose of obtaining information therein contained. In the first case the government is entitled to the possession of the goods; in the latter it is not. The seizure of stolen goods was authorized by common law, so also has the seizure of goods forfeited for a breach of the revenue laws or concealed to avoid the duties payable on them been authorized by English statutes for two hundred years, and like seizures have been authorized in this country from the commencement of the government. Hence, it is clear that such seizures were not regarded as "unreasonable" by the framers of the original amendments to the Constitution. It is further pointed out in the opinion that the search for and seizure of articles and things which it is unlawful for a person to have in his possession, such as counterfeit coins, lottery tickets, implements of gambling, etc., are not in this category.

[4] 192 U. S. 585.

certainty, that the seizure of private papers incidentally in the execution of a legal warrant to secure gambling apparatus, and the subsequent admission of such papers in evidence did not violate the privileges accorded in the Fourth and Fifth Amendments. The accused was being prosecuted for having in his possession the gambling apparatus and the court proceeded upon the theory that, having a legal right to search for property relating to the offense charged, a seizure of such property, though not specifically mentioned in the search warrant, would be reasonable; and should not, therefore, be excluded from evidence. The state had the right, in the enforcement of its laws, to seize the gambling apparatus, since its possession was made unlawful by statute; but it can hardly be maintained, without disregarding the manifest spirit of the Fourth Amendment, that such a right extended to the seizure of private books and papers, the possession of which was not unlawful, and in which the state could have no interest.

This question again arose in the United States Supreme Court under a slightly different state of facts, in the case of Weeks *v.* United States.[5] In that case letters and papers of the accused were seized by an officer acting under color of office but without warrant or authority. Application for their return was made before trial, but was denied, and the evidence was received at the trial. It was held, that the privilege of the Fourth Amendment had been violated and prejudicial error committed in admitting the evidence. The tendency is manifested in this decision toward a return to the broad principles enunciated in the Boyd Case.[6] This case differs from the Adams Case in the particular that the seizure was made without any legal authority whatsoever, whereas in that case there was an incidental seizure under a valid warrant. On principle, however, the one is as flagrant a violation of the constitutional provision as is the other. The provision is intended to safeguard the rights of the people against the encroachments of arbitrary power, and every right which falls within its purview should be enforced in its minutest detail. Any search or seizure which goes beyond the point of reasonableness should be declared invalid, and no better criterion appears for determining the question of the reasonableness or unreasonableness of the search or seizure than the fact that the evidence is to be used against the party to aid in his conviction.

It was said in the Adams Case that the effect of the privilege did

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[5] 232 U. S. 383.

[6] It was said in the opinion: "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

not extend so far as to exclude testimony which had been illegally obtained, if the evidence were otherwise competent. In the Weeks Case much was made of the fact that application was duly made before trial for the return of the papers unlawfully seized, which was passed upon by the court and denied. And this fact was deemed to constitute one of the chief grounds of distinction between the two cases. It seems to be a well established rule of evidence, supported by numerous decisions, that a criminal court will not permit a collateral issue to be raised with respect to the source of relevant and material evidence.[7] And it is maintained that this fact cannot be asserted upon the introduction of evidence at the trial, even though such evidence is obtained through a violation of a constitutional right.[8] The reason of the rule appears to be that an objection to the reception of evidence at trial raises only the question of its materiality, competency, and relevancy, and the court cannot halt the orderly progress of a cause to try a collateral issue, which relates to the source from which the evidence is obtained. Where a constitutional right has been violated in obtaining the evidence, it has been held that the remedy lies in making seasonable application for the return of such evidence before trial, and that if this application is denied, and the evidence admitted upon subsequent trial, then a reversible error has been committed. It is not the purpose here to discuss generally the expediency of this rule of evidence; but that a constitutional right should in effect be denied and set aside because of it seems hardly in keeping with the idea of the Constitution as the fundamental law of the land, which declares the fundamental rights of a free people, and to which every person under its jurisdiction, be he whatsoever he may, may appeal in his extremity. Even if a question involving a constitutional right can be conceived of as collateral to an issue, yet it is difficult to understand how that collateral fact can be made a material fact merely by formal motion before trial.[9] In the recent

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[7] WIGMORE, EV., § 2183; Adams *v.* New York, *supra;* Lum Yan *v.* United States (C. C. A.), 193 Fed. 970.

[8] It is said that, "necessity does not require, and the spirit of our law does forbid, the attempt to do justice incidentally and to enforce penalties by indirect methods." Thus, "a judge does not hold court in a street car to do summary justice upon a fellow passenger who fraudulently evades payment of his fare; and, upon the same principle, he does not attempt, in the course of a specific litigation to investigate and punish all offenses which incidentally cross the path of that litigation." WIGMORE, EV., § 2183. This is undoubtedly true so far as attempting to do justice incidentally, and enforcing penalties by indirect methods is concerned; but does this fact constitute any reason why a court in the administration of justice should not do full and complete justice to the party before it, and secure to such party every right given him by the Constitution and the laws?

[9] The whole policy of the law in modern times is directed toward getting away as far as possible from the technicalities of the ancient common law. Such a position as this seems hardly in conformity with this policy. It would seem that if the privilege is to be given the full effect intended by its framers, a right claimed under it should be allowed to be asserted at any time.

case of *Flagg* v. *United States* (C. C. A.), 233 Fed. 481, books and papers of the accused were seized without warrant or authority. On trial for a violation of the federal postal laws, these books and papers were admitted in evidence and a conviction obtained. On appeal, the judgment was reversed, the court saying:

"We do not deem it necessary to discuss all the questions mooted on the brief relating to the admission and exclusion of evidence at the trial. We prefer to rest our decision on the broad ground that the constitutional rights of the defendant were violated by the unlawful seizure of his books and papers by the officers and agents of the United States acting without warrant or pretense of legal authority."

The chief point in this case worthy of note is the fact that the decision rests solely upon the ground that a conviction cannot be obtained on evidence procured through a violation of the constitutional guarantee, and this amounts in effect to a repudiation—so far as these cases are concerned—of the rule prohibiting a criminal court from permitting a collateral issue to be raised with respect to the source of relevant and material evidence.

The admission of papers illegally seized leads to a violation of the Fifth Amendment, which provides that no person "shall be compelled in any criminal case to be a witness against himself," in that evidence is disclosed, as the result of the illegal seizure, which would not otherwise be brought to light.[10] It was held, however, in the Adams Case that there had been no violation of the Fifth Amendment, because the accused was not compelled to testify concerning the papers or make any admission about them. But, as was said by Mr. Justice Bradley in the Boyd Case, there seems to be no substantial difference between the seizure of a man's private papers to be used in evidence against him and in compelling him to be a witness against himself.[11]

The decisions of the state courts on the question of the admissibility of evidence illegally seized are far from being in harmony. These courts, in the administration of criminal law, are confessedly not accustomed to be oversensitive in regard to the sources from which evidence is obtained. Some of them openly take the posi-

[10] Hammock *v.* State, 1 Ga. App. 126, 58 S. E. 66. It is maintained by some authorities that the privilege of the Fifth Amendment only protects a person from a disclosure sought by legal process against him as a witness. WIGMORE, EV., § 2264. It follows from this that documents or chattels obtained from the person's control without the use of process against him as a witness are not within the scope of the privilege, and may be used evidentially. Such a principle would rob the constitutional guarantee of the greater part of its value. The weight of authority undoubtedly supports this rule, but it is believed that the minority view is on reason and principle correct. Underwood *v.* State, 13 Ga. App. 206. 78 S. E. 1103; State *v.* Slamon, 73 Vt. 212. 50 Atl. 1097.

[11] Boyd *v.* United States, *supra*. A note in 1 VA. LAW REV. 70, seems to adopt the view of the Adams Case; but that was prior to the decision in the Weeks Case.

tion that if the evidence is relevant it is admissible, however illegal may be the methods of obtaining it, so long as the accused is not actually compelled to do an affirmative act which would incriminate him.[12] Such a position is not conducive to maintaining that solemn and dignified procedure which should characterize every court in handling questions involving the life or property of an individual.[13] The reason ordinarily assigned for admitting the evidence illegally seized, other than that the remedy lies in making due application for the return of such evidence before trial, is that the inhibition of the Fourth Amendment was directed against the government to impose a salutary restriction upon its powers, and does not extend to the act of an officer, who in exceeding or abusing his authority acts as an individual and not in behalf of the state.[14] This position appears anomalous. The court repudiates the act of the officer as its own, declares it illegal and is willing to punish the officer for his violation of the law, yet claims the benefit of his unlawful act. As a matter of fact, this policy would seem to encourage the commission of crime for the sake of detecting a previous crime and of bringing the offender to justice. "These arbitrary methods of discovering crime are subversive of the fundamental principles of law, destructive of the indefeasible rights of personal liberty, personal security and private property, and place at the mercy of every petty official and consciousless criminal the life, liberty and reputation of the citizen." [15]

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[12] Gindrat *v.* People, 138 Ill. 103, 27 N. E. 1085; State *v.* Atkinson, 40 S. C. 363, 18 S. E. 1021; Shields *v.* State, 104 Ala. 35, 16 South. 85; Williams *v.* State, 100 Ga. 511, 28 S. E. 624.

[13] 2 WHARTON, CRIM. EV., § 518f.

[14] Imboden *v.* People, 40 Colo. 142, 90 Pac. 608.

[15] Hill, C. J., in discussing both the Fourth and Fifth Amendments in Underwood *v.* State, *supra.* See also, Blacksburg *v.* Beam (S. C.), 88 S. E. 441; State *v.* Slamon, *supra;* State *v.* Sheridan, 121 Iowa 164, 96 N. W. 730.